

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-219654

DATE: November 12, 1985

MATTER OF: The W.H. Smith Hardware Company

## DIGEST:

1. Since section 401 of the Small Business and Federal Procurement Competition Enhancement Act of 1984 prohibits any exemption from the requirement for referral of small business nonresponsibility determinations to the Small Business Administration (SBA), exemption is no longer available for small purchase procedure procurements, so that a non-responsibility determination thereunder must be referred to SBA for review under the certificate of competency procedures.
2. Where the Small Business Administration (SBA) declines to issue a certificate of competency (COC) on one procurement, and for similar reasons the contracting officer finds the same company nonresponsible on another procurement shortly before SBA's action, the nonresponsibility determination on the other second procurement may be considered to have been in essence ratified by SBA even though there was no referral for COC consideration.

The W.H. Smith Hardware Company (Smith) protests the contracting officer's rejection of Smith as nonresponsible under solicitation No. DLA700-85-Q-RC21, issued by the Defense Construction Supply Center (DCSC), Defense Logistics Agency (DLA), without referring the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures.

We deny the protest.

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Smith submitted the second low quotation on the solicitation which was conducted under small purchase procedures. On July 24, 1985, after finding the low offeror nonresponsible, the contracting officer found Smith was nonresponsible because of a high delinquency rate on prior contracts. Because the procurement was conducted under small purchase procedures, the contracting officer relied on the Federal Acquisition Regulation, 48 C.F.R. § 19.602-1(a)(2) (1984), which provides that referral to SBA for COC consideration, which is normally required when a small business is found nonresponsible by a contracting officer, is not required if small purchase procedures are being used. Accordingly, the contracting officer did not refer the matter to SBA. The contract was awarded to the next low offeror, Creole Inc., on August 7.

No small purchase procedure exemption from the COC referral requirement is permissible. In Sess Construction Co., 64 Comp. Gen. 355 (1985), 85-1 C.P.D. ¶ 319, we concluded that while SBA had, by regulation, established an exemption from referral for contracts with a value less than \$10,000, this exemption was statutorily impermissible. Under the Small Business and Federal Procurement Competition Enhancement Act of 1984, Pub. L. No. 98-577, § 401, 98 Stat. 3,082, October 30, 1984 (effective upon enactment), all nonresponsibility determinations are required to be referred to SBA for consideration under SBA's COC procedures, so long as the small business concern wishes its application to be considered. The SBA revised its regulations to implement section 401 on March 27, 1985. See 50 Fed. Reg. 11,994. Further, while the FAR has not yet been modified, DLA concedes that the Defense Acquisition Regulatory Council has approved a revision of the FAR to conform to the statutory requirement. Thus, it is clear that no small purchase exception from small business COC referral requirements is currently available. See Sermor, Inc.--Reconsideration, B-218340.3, Sept. 18, 1985, 85-2 C.P.D. ¶ 297.

However, we also note that DCSC had referred other Smith nonresponsibility determinations to SBA for COC consideration, at approximately the same time. On August 19 and 30, 1985, SBA declined to issue COC's to Smith under three similar DCSC procurements. The SBA rationale for the August 30 denial was based on Smith's historically high delinquency record, notwithstanding recent improvement. In view of these contemporaneous COC denials, within a month of DLA's nonresponsibility determination, we think that SBA has

in essence ratified the contracting officer's nonresponsibility determination. DCSC's nonresponsibility determination was based on Smith's high delinquency rate and SBA confirmed the finding that Smith's delinquency rate was a sufficient basis to decline to issue a COC. Therefore, we find no prejudice to the protester under these circumstances, since SBA considered the same facts in issue and reached the same conclusion as the contracting officer in the same timeframe. See Sayco Ltd., 62 Comp. Gen. 469 (1983), 83-1 C.P.D. § 656; Sigma Industries, Inc., B-195377, Oct. 5, 1979, 79-2 C.P.D. ¶ 242.

The protest is denied.

*for Seymour Efron*  
Harry R. Van Cleve  
General Counsel